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In the Supreme Court of the United States

OCTOBER TERM, 1956

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SOUTHERN SILK MILLS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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v.

SOUTHERN SILK MILLS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on April 2, 1957 (*infra*, pp. 18-19), which denied enforcement of the Board's back-pay order and remanded the case to the Board for further hearing and findings.

OPINIONS BELOW

The opinion of the court below, dated April 2, 1957 (*infra*, pp. 13-17), is reported at 242 F. 2d 697. The findings of fact, conclusions of law, and order of the Board (*infra*, pp. 20-61) are reported at 116 NLRB 769.

JURISDICTION

The judgment of the court below was entered on April 2, 1957. The jurisdiction of this Court is invoked

under 28 U.S.C. 1254 and Section 10(e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Whether, under the National Labor Relations Act, an employee who, following his discriminatory and unlawful discharge, made a persistent and good-faith search for employment similar to that from which he was wrongfully discharged is nevertheless subject (as held by the Court of Appeals) to a diminution of his back pay for "wilfully incurred losses" if he failed to seek a different type of employment at a lower rate of pay.

2. If so, whether the Court of Appeals nonetheless erred because it assumed that it would be the employee's burden to show the unavailability of other types of employment, rather than the employer's burden to establish the facts upon which the defense of wilful idleness rests.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 62-63.

STATEMENT

The Labor Board found that the respondent company had discriminatorily discharged forty employees in violation of the National Labor Relations Act, and it ordered their reinstatement with back pay.[1] On December 21, 1953, the Court of Appeals for the Sixth Circuit rendered an opinion and entered a decree enforcing the original order of the Board. 209 F. 2d 155, certiorari denied, 347 U.S. 976. Informal negotiations to deter-

[1] The decision is reported at 101 NLRB 1.

mine the precise amount of back pay resulted in agreement as to the amounts due 38 of the 40 employees involved.[2] The parties being unable to agree as to the amounts due two employees, Hill and Fugate, the Board conducted a formal hearing to determine their losses. Upon the evidence contained in the record of this supplemental hearing, the Board concluded that Hill had suffered a net loss of $6,536.62 and Fugate a net loss of $5,666.64, and ordered respondent to pay these amounts (*infra*, pp. 26-27). Respondent refused, and the Board moved the Court of Appeals to issue a supplemental decree enforcing its back-pay order. The Court of Appeals denied the Board's motion and remanded the case to the Board for further hearings and findings (*infra*, p. 17). It is this judgment which the Board now petitions the Court to review.

The relevant facts as found by the Board may be summarized as follows:

The Company operates a textile mill in Spring City, Tennessee, where it manufactures women's apparel. At the time of their unlawful discharge, Hill and Fugate were employed as knitters and were being paid 80 and 95 cents per hour respectively. It was stipulated that Hill would have earned $6,536.62 during the period from May 1, 1951, the date of her discharge, to June 7, 1954, the date of her reinstatement; and that Fugate would have earned $5,666.64 from her discharge, also on May 1, 1951, to November 27, 1953 (the stipulated cut-off date in her case) (*infra*, p. 36).

At the time of their discharge, Hill and Fugate both lived in Spring City, which has a population of about 1,600. Although there was no factory employment available for women in Spring City except at the Com-

[2] The reinstatement provisions of the decree have been satisfied.

pany's plant, both employees made diligent and persistent efforts to locate other factory employment in nearby cities. They registered for employment with the Tennessee Department of Employment Security, they made personal applications at textile mills and other factories in the area which employed women, and they kept their applications current throughout the back-pay period by repeat visits (*infra*, pp. 39-45). Despite their efforts and those of the Tennessee Department of Employment Security, neither employee was able to locate a job.

On the basis of these facts, the Trial Examiner found that both employees had made reasonable efforts to locate employment substantially equivalent to that from which they were wrongfully discharged. However, the Trial Examiner held that, after a reasonable period of time had elapsed during which the employees' efforts to obtain substantially equivalent employment had proved unsuccessful,[3] the employees should have "lowered their sights" and sought less remunerative employment within their mental and physical capacities, such as employment in retail establishments (*infra*, pp. 55-58). Recognizing that no suitable retail opportunities existed in Spring City, the Examiner expressed the view that the employees should have canvassed the retail opportunities in Dayton and Rockwood, Tennessee, two towns some sixteen miles distant from Spring City (*infra*, pp. 58-59). Although the record does not show whether vacancies in such jobs existed or the wages which such jobs might have afforded, the Examiner assumed that the employees could have

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[3] The Examiner thought that eight months was such a reasonable period (*infra*, p. 59).

earned $20 a week in retail work. Accordingly, he awarded the employees full back pay for the eight months from May 1, 1951, to December 31, 1951, on the theory that it was reasonable for the employees to have sought only equivalent employment during the first stages of unemployment. However, for the period beginning January 1, 1952, the Examiner deducted $20 a week from the back pay due each employee (without, incidentally, taking into account the cost of commuting from Spring City to Rockwood or Dayton, the cities in which the retail opportunities were assumed to exist) (*infra*, pp. 59-60).

The Board, like the Trial Examiner, held that the employees had made a diligent search for substantially equivalent employment during the entire back-pay periods involved (*infra*, p. 24). The Board held further, contrary to the Trial Examiner, that the employees had not been obliged to "lower their sights" and seek lesser employment. In the Board's view, the obligation to minimize damages is satisfied if the employee "makes reasonable efforts to find new employment which is substantially equivalent to the position from which he is discharged and is suitable to a person of his background and experience" (*infra*, p. 26). To require an employee to seek less desirable employment would, in the Board's judgment, "seriously impair the effectiveness of the back pay remedy as a means of effectuating the purposes of the Act." The Board accordingly awarded each employee the full amount of the back pay which she had lost because of her unlawful discharge (*infra*, p. 26).[4]

[4] Member Rodgers, dissenting, stated that he would award no back pay for periods when the employees were not actively registered with the Tennessee Department of Employment Security (*infra*, p. 27).

The court below concurred in the finding of the Examiner and the Board that both employees had made reasonable and diligent efforts to locate substantially equivalent employment during the back-pay period (*infra*, p. 15). However, the court, agreeing with the Trial Examiner, reversed the Board and held that employees are obliged to seek and take suitable employment, even though different in kind and less remunerative. It held that the "failure of these two employees, under the conditions existing in the present case, to seek or take other suitable, available employment, although at a lower rate of pay, over a period of approximately three years, constitutes to some extent at least loss of earnings 'wilfully incurred'" (*infra*, p. 17). The court remanded the case to the Board to make further findings as to the amounts to be set off in mitigation of damages, with leave to the parties to present further evidence.

REASONS FOR GRANTING THE WRIT

1. It is well settled that in making back-pay awards the Board "must have regard for considerations governing the mitigation of damages." *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 346. The critical difference between the Board and the court below may be simply stated. The Board has adopted the approach that the obligation of a wrongfully discharged employee to minimize his loss of earnings is satisfied if, upon consideration of all the pertinent circumstances, it appears that he has made reasonable efforts to find employment substantially equivalent to that from which he was discharged. The Board applies this rule as a pragmatic one, depending on the particular facts. (*supra*, p. 5.) The

court below, however, has laid down, as a rule of law, that, if reasonable efforts fail to yield substantially equivalent employment, an employee's duty to the employer to mitigate damages requires that he seek and accept a different and less desirable type of employment which may be available.

The Sixth Circuit's view, if correct, will have broad impact; potentially, it affects every case under the National Labor Relations Act involving wrongful discharge of employees and back-pay computation. During the fiscal year ending in June 1956, there were filed with the Board approximately 3,000 charges that employers had engaged in job discrimination against employees; each of these charges involved potential back-pay awards. In cases closed during the same period, 1,841 employees were offered job reinstatement and approximately 2,000 received back-pay awards.[5]

We believe it apparent that the disagreement between the Board and the court below as to the scope of the obligation resting upon a wrongfully discharged employee to minimize his loss of earnings presents a matter of general importance in the administration of the Act warranting review by this Court.

2. In drawing its back-pay order in this case, the Board exercised the authority granted it by Section 10(*c*) of the Act to require "such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." The power to devise back-pay orders "is a broad discretionary one . . . for the Board to wield, not for the courts." *National Labor Relations Board* v. *Seven-Up*

[5] *Twenty-first Annual Report of the National Labor Relations Board* (Gov't Print. Off. 1956), pp. 4-5, 166.

Bottling Co., 344 U.S. 344, 346. This power is no of course, without limits. As this Court observed i *Phelps Dodge Corp. v. National Labor Relation Board*, 313 U.S. 177, the Board, in making back-pa awards, must have regard for considerations goveri ing the mitigation of damages and an employee coul be deemed wilfully idle where he engaged in a "clearl unjustifiable refusal to take desirable new employ ment." Since that decision, the Board has held that wrongfully discharged employee is obliged to mak reasonable search for desirable new employment an that this duty is met where the employee makes reason able efforts to find new employment which is substan tially equivalent to his former position.[6] See *Ohi Public Service Company*, 52 NLRB 725; *Harves Queen Mill & Elevator Co.*, 90 NLRB 320; *infr* pp. 25-26.[7] Giving heed to "the importance of takin

[6] The phrase "substantially equivalent employment" appears the statutory definition of the term employee as including "any i dividual whose work has ceased as a consequence of, or in conne tion with, any current labor dispute or because of any unfair lab practice, and who has not obtained any other regular and substa tially equivalent employment * * *." Sec. 2(3). In *Phelps Dodg supra*, 313 U.S. at 188-195, this Court dealt with the questi whether the Board had power to order the reinstatement of strike who had obtained substantially equivalent employment and co cluded that it did.

[7] In *Ohio Public Service Company*, *supra*, the Board adopted t policy, subsequently reaffirmed in *Harvest Queen*, *supra*, of trea ing proof of registration by a discharged employee with a gover nment employment service as conclusive evidence that a reasonab search for employment had been made. In the instant case, t Board reconsidered this policy and decided that it would no long give conclusive weight to such registration in determining the iss of reasonable search but would treat such registration as a fact to be given appropriate weight in the light of the surrounding ci cumstances. Cf. *American Bottling Company*, 116 NLRB 130 1306-1307. This issue is not presented in this case.

fair account, in a civilized legal system, of every socially desirable factor in the final judgment," the Board has thus struck a balance between the "healthy policy of promoting production and employment" (*Phelps Dodge*, *supra*, 313 U.S. at 198, 200) and the statutory policy of discouraging unlawful discrimination.[8]

The standard of "substantially equivalent employment" is, of course, flexible and permits adaptation to individual facts and circumstances. It provides a broad, but not rigid, frame of reference within which the Board may exercise the discretion and the fact-finding powers vested in it by Congress. In appropriate circumstances, the Board may hold an employee obliged to mitigate damages by taking employment which is not the same as his former employment, *e.g.*, where the

[8] The standard of "substantially equivalent employment" applied by the Board is similar to the common law rule which is almost universally applied in cases involving breaches of employment contracts. Under that rule, a wrongfully discharged employee satisfies his obligation to mitigate damages by seeking similar employment; there is no obligation to seek or take "service of a different or inferior kind." *Stoffel* v. *Metcalfe Construction Co. et al.*, 145 Nebraska 450, 17 N.W. 2d 3, 8. *Accord: State ex rel. Freeman* v. *Sierra County Board of Education*, 49 N.M. 54, 157 P. 2d 234, 235-236; *Crabtree* v. *Elizabeth Arden Sales Corp.*, 105 N.Y.S. 2d 40, 44-45 (Supreme Court); *Edgecomb* v. *Traverse City School District*, 341 Mich. 106, 67 N.W. 2d 87, 90-92; *Williams* v. *Leaf Tobacco Co.*, 293 Ky. 207, 168 S.W. 2d 570, 572-573; Williston *Contracts*, Revised Ed. 1936, Sections 1358, 1359 (pp. 3811-3816) and cases cited; *Restatement of Torts*, Section 918, Comment f; cf. *Mooresville Cotton Mills* v. *National Labor Relations Board*, 110 F. 2d 179, 181 (C.A. 4). See, also, the notes in 28 A.L.R. 736 and 141 A.L.R. 662. There is a minority view, held in one or two states, that a wrongfully discharged employee is bound to seek and accept some other kind of work for which he is fitted, if he is unable to obtain employment of a similar nature. See 28 A.L.R. 744-746 and cases there cited; also, *Williams* v. *Leaf Tobacco Co.*, 293 Ky. 207, 168 S.W. 2d 570, 573.

differences in the job itself or in the attendant conditions of work and pay are relatively inconsequential. The vice of the decision below is that it replaces the frame of flexible discretion within which the Board has operated and binds the Board to a rule of law, that an employee must be prepared to forego damages if he fails to "lower his sights" by seeking less desirable employment in a field quite foreign to the job from which he has been improperly discharged.

The rule declared by the court below, by placing upon wrongfully discharged employees a strict duty of seeking unrelated types of employment, will necessarily tend to weaken the deterrent effect of the back-pay remedy; by the same token, it will tend to discourage both the victims of discrimination and those who remain on the job from engaging in lawful concerted activity.

3. Apart from the correctness of the Court of Appeals' holding as to the scope of the employee's duty to mitigate damages, the decision below presents the question whether it is incumbent upon the employee to show the unavailability of other employment or whether (as we believe) it is the employer's burden to develop the facts upon which the defense of wilful idleness rests. This question of burden of proof is, in itself, one of importance in the administration of the Act.

The record in the instant case establishes only that positions may have been available as farm laborers, chambermaids, or waitresses. These positions were found "unsuitable" by the Trial Examiner—a finding which was sustained by the Board and not reversed by the court below (*infra*, pp. 21, 56). While the Examiner thought that suitable retail employment would have

been available in nearby towns, and based his allowance of a set-off on this hypothesis, the record is devoid of evidence that such opportunities existed, that the employees in question were qualified therefor, or that a search for such employment would have proved fruitful.

The burden of proving the existence of other employment opportunities and related facts properly rested upon the respondent—both because it was the wrongdoer and because the matter is one of affirmative defense. If the employer asserts the defense of wilful idleness, it is for him "to go to proof on this issue." *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 200; *National Labor Relations Board* v. *J. G. Boswell Co.*, 136 F. 2d 585, 597 (C.A. 9); cf. *Fisher Construction Co.* v. *Lerche*, 232 F. 2d 508, 509 (C.A. 9).[9] Respondent plainly did not meet this bur-

[9] See also 134 A.L.R. 243, 257 for a discussion of the analogous common law problem and a large collection of the relevant cases. The conclusion reached there is that "[t]he overwhelming weight of authority is to the effect that in actions for damages arising out of either breach of contract or tort the burden is upon the party whose wrongful act caused the damages complained of to prove anything in diminution of the damages, or, in other words, that the damages were lessened or might have been lessened by reasonable diligence on the part of the aggrieved party."

den. The court's action in remanding the case to the Board for further proceedings reflects the erroneous conclusion that respondent was not obliged to do so.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. LEE RANKIN,
Solicitor General.

JEROME D. FENTON,
General Counsel,
STEPHEN LEONARD,
Associate General Counsel,
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National Labor Relations Board.

JUNE 1957.

APPENDIX

1. Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 11898

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SOUTHERN SILK MILLS, INC., RESPONDENT

ON MOTION of the National Labor Relations Board for Entry of a Supplemental Decree Fixing the Amounts of Back Pay Due.

Decided April 2, 1957

Before: ALLEN, MARTIN and MILLER, Circuit Judges.

MILLER, Circuit Judge. On December 21, 1953 this court granted enforcement of the order of the National Labor Relations Board which directed the respondent, among other things, to reinstate certain employees, and to make them whole for any loss of pay they may have suffered because of their illegal discharge. *N. L. R. B.* v. *Southern Silk Mills*, 209 F. (2d) 155, C.A. 6th, cert. denied, 347 U.S. 976. The reinstatement provisions of the decree have been satisfied.

Agreements on back pay were reached by respondent with 38 of the 40 employees involved. The respondent was unable to reach an agreement with the other two employees, Irene M. Hill and Effie Reed Fugate, and the Board conducted a hearing to determine the losses suffered by these employees. The Board found that Hill had suffered a net loss of $6,536.62 and Fugate a net loss of $5,666.64. The proceeding is again before the

court on the Board's motion for a supplemental decree specifying these amounts as due these two employees.

The respondent challenges each award on the ground that the employee was wilfully idle during the entire back-pay period and that the Board did not give respondent credit for what the employee would have earned in other suitable employment if she had engaged in such employment instead of remaining idle.

The respondent manufactures women's apparel in Spring City, Tenn., a town of about 1600 population. Hill and Fugate lived in Spring City and were employed as knitters at respondent's plant. There was no factory employment available for women in Spring City except at respondent's plant. At the time of her discharge on May 1, 1951 Hill was 28 years old and married. In October 1951 she moved to Chattanooga, Tenn. She returned to Spring City from March until May 1952. From May to September 1952 she lived in Detroit, Michigan. She returned to Spring City in September 1952. In October 1952 she moved to Chattanooga. In November 1953 she returned to Spring City where she remained until re-employed by respondent on June 7, 1954.

Fugate was also discharged on May 1, 1951. It was stipulated that the cut-off date for her was November 27, 1953, when she stopped looking for work because she had been rejected so often because of her age. The record does not show how old she was. She resided in Spring City during the entire period of her discharge.

At the time of the discharges Hill was being paid 80 cents an hour and Fugate was being paid 95 cents an hour. At these rates, Hill would have earned $6,536.62 during the period of unemployment and Fugate would have earned $5,666.64. Neither Hill nor Fugate had any offsetting earnings during their periods of discharge.

The Trial Examiner found that the two employees made reasonable efforts to secure substantially equivalent positions, both as to type and salary, to those from which they were discharged, but were not able to do so. The Board adopted this finding and made the awards in their respective gross amounts. We are of the opinion that this finding of fact is supported by substantial evidence on the record considered as a whole, and is accepted by us. *Sect. 160(2), Title 29, U. S. Code.* However, there is presented for consideration whether this finding was sufficient to support the awards.

The Trial Examiner ruled that it was to be expected that a dischargee should continue for a certain period to seek positions at least equal to his prior position, both as to salary and other working conditions; that if he were to immediately accept a position at a substantially lower salary he might face a defense that he did not exercise proper care and diligence by doing so; yet there comes a time after opportunities for comparable jobs have been canvassed without success, when the job applicant must lower his sights or face a long period of idleness. He pointed out that the two employees were discharged May 1, 1951 and spent the next seven months in a fruitless search for comparable factory employment. He ruled that at that point, namely, January 1, 1952, they should have sought lower paying positions, which, although not "desirable" from the salary standpoint, would have been satisfactory employment for one of their training, experience and background. He held that because of their lack of training and experience, there was no obligation upon them to obtain farm labor work or positions as waitresses or chambermaids. But he pointed out there was available employment at the Southern Freezing and Preserving Company in Dayton, where one of their fellow dischargees had obtained employment, and that they had made no effort

to obtain employment in the retail trades which in all probability would have furnished satisfactory employment at a lower rate of pay. He accordingly allowed offsetting deductions from January 1, 1952 on for amounts which in his opinion they probably could have earned in such lower paid employment. The Board refused to approve the Examiner's ruling, holding that there was no obligation on the part of a discriminatee to lower his sights and accept a lower paying position, and that the obligation to minimize his loss of earnings is satisfied if he makes reasonable efforts to find new employment which is substantially equivalent to the position from which he was discharged and is suitable to a person of his background and experience.

If the Board's ruling on this legal issue applicable to back-pay awards is not the correct one, its finding that these two dischargees made reasonable efforts to secure "substantially equivalent" positions is not decisive of the case. The Board has made no finding with respect to their efforts to obtain satisfactory, although lower-paid, employment in other available fields.

In *Phelps Dodge Corp.* v. *N. L. R. B.*, 313 U. S. 177, 197-200, the Supreme Court approved a back-pay order of the Board which fixed the amount at what the employee normally would have earned if not discharged less his earnings during the discharge period. The Court said: "Since only actual losses should be made good, it seems fair that deductions should be made not only for actual earnings by the worker but also for losses which he willfully incurred." It also referred to the opportunity of the Board to "give appropriate" weight to a clearly unjustifiable refusal to take desirable new employment." In *N. L. R. B.* v. *Seven-Up Co.*, 344 U. S. 344, 346, the Court said that in making back-pay awards, the Board must have regard for considerations governing the mitigation of damages. See:

N. L. R. B. v. Stilley Plywood Co., 199 F. (2d) 319, 321, C. A. 4th. This does not expressly answer the question now presented. Restatement, *Contracts, Sect. 336 (1)(d)*. We are of the opinion, however, that the usual wage earner, reasonably conscious of the obligation to support himself and family by suitable employment, after inability over a reasonable period of time to obtain the kind of employment to which he is accustomed, would consider other available, suitable employment at a somewhat lower rate of pay "desirable new employment." The fact that a married woman employee is being supported by her husband during the discharge period should not relieve her of the obligation to accept suitable employment. The failure of these two employees, under the conditions existing in the present case, to seek or take other suitable, available employment, although at a lower rate of pay, over a period of approximately three years, constitutes to some extent at least loss of earnings "willfully incurred." We are of the opinion that the Board was in error in making the back-pay awards without offsetting credits against such losses. *N. L. R. B. v. Pugh & Barr, Inc.*, 207 F. (2d) 409, C. A. 4th; *N. L. R. B. v. Moss Planing Mill Co.*, 224 F. (2d) 702, C. A. 4th; *N. L. R. B. v. Alaska S.S. Co.*, 211 F (2d) 357, 360-361, C.A. 9th. When such credits should begin and in what amounts they should be allowed are questions which should receive the consideration of the Board.

Enforcement of the Board's order is denied and the case is remanded to the Board for additional findings with respect to this issue, with leave to the parties to present further evidence if so desired.

2. Judgment Below

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable, THE NATIONAL LABOR RELATIONS BOARD, GREETING:

WHEREAS, lately the NATIONAL LABOR RELATIONS BOARD before you, or some of you, in case No. 10-CA-1293 entitled Southern Silk Mills, Inc. and United Textile Workers of America, AFL-CIO, a supplemental decision and order was entered on the 22nd day of August, 1956, and an order was entered on the 24th day of October, 1956, denying petition for review or reconsideration of said supplemental decision and order,

AND WHEREAS, the said National Labor Relations Board petitioned this Court as appears by inspection of the transcript of record of the said National Labor Relations Board which was brought into the United States Court of Appeals for the Sixth Circuit by virtue of motion for entry of supplemental decree agreeably in the Act of Congress, in such cases made and provided, fully and at large appears.

AND WHEREAS, in the present term of October, in the year of our Lord, one thousand nine hundred and fifty-six the said cause came on to be heard before the said United States Court of Appeals for the Sixth Circuit, on the said transcript of record, and was argued by counsel;

ON CONSIDERATION WHEREOF, the following order was entered on the 2nd day of April 1957:

"This action is before the Court on the motion of the National Labor Relations Board for the entry of a supplemental decree specifying the amounts due by the respondent to employees, Irene M. Hill and Effie Reed Fugate, in accordance with the Board's supplemental

order entered subsequent to the decree of enforcement entered by this Court on December 21, 1953, *N.L.R.B. v. Southern Silk Mills*, 209 F(2) 155, and the Board's supplemental proceedings for the purpose of determining said amounts;

"And having been considered by the Court on the record, briefs and argument of counsel for the respective parties;

"IT IS ORDERED that the motion be overruled, that enforcement of the Board's supplmental order be denied, and the cause be remanded to the Board for further proceedings consistent with the views expressed by the Court in its Opinion of this date."

YOU, THEREFORE, ARE HEREBY COMMANDED that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said motion for review notwithstanding.

WITNESS, the Honorable EARL WARREN, Chief Justice of the United States, the twenty-fourth day of April in the year of our Lord one thousand nine hundred and fifty-seven.

(S.) CARL W. REUSS,
Clerk, United States Court of Appeals
for the Sixth Circuit

3. The Board's Decision and Order

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 10-CA-1293

SOUTHERN SILK MILLS, INC., AND UNITED TEXTILE WORKERS OF AMERICA, AFL-CIO

Supplemental Decision and Order

On October 21, 1952, the Board issued its Decision and Order in the above-entitled case,[1] finding, *inter alia*, that the Respondent had violated Section 8 (a) (3) and (1) of the Act by discriminatorily discharging 40 employees. The Board, as part of its remedy, ordered the Respondent to make these employees whole for any loss of pay which they might have suffered as a result of the discrimination against them.

In due course, the Board petitioned the United States Court of Appeals for the Sixth Circuit for enforcement of its Order. On December 21, 1953, the Court granted enforcement of the Board's Order. Thereafter, on June 29, 1955, the Regional Director for the Tenth Region issued a Notice of Hearing for the purpose of receiving evidence material to a determination of the amounts of back pay due the discriminatees. Informal negotiations between the General Counsel and the Respondent, both before and after the issuance of the Notice, resulted in agreement as to the amounts due 38 of the 40 employees. As to the remaining two employees, Irene M. Hill and Effie Reed Fugate, a hearing was held on August 15, 25, and 26, 1955, before Trial Examiner Sidney L. Feiler. On November 17, 1955, the Trial Examiner issued his Supplemental Interme-

[1] 101 N. L. R. B. 1.

diate Report and Recommendation attached hereto, in which he recommended that Hill and Fugate be awarded specified amounts of back pay. Thereafter, the Respondent and the General Counsel filed exceptions to the Supplemental Intermediate Report and briefs in support of their exceptions.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Supplemental Intermediate Report, the exceptions and briefs, and the entire record in the case,[2] and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following additions and modifications:

It was stipulated that Mrs. Hill's gross earnings, but for the discrimination, would have been $6,536.62 over a back-pay period of 3 years and 5 weeks, and that Mrs. Fugate's would have been $5,666.64, for a period of 2 years and 31 weeks. Neither dischargee had any offsetting earnings. No contention was made that the dischargees unjustifiably refused to take desirable new employment. The only issue raised in this proceeding is whether, as alleged by the Respondent, the dischargees failed to make reasonable efforts to secure other employment during their respective back-pay periods.

In the wartime case of *Ohio Public Service Company*, 52 N. L. R. B. 725, the Board for the first time permitted a respondent to raise this issue as a defense in a back-pay computation proceeding. In the same case, the Board adopted the policy, to be applicable for the duration of the war, of treating proof of regis-

[2] Including the Stipulation of the parties received by the Board February 13, 1956.

tration by a dischargee with the United States Employment Service as conclusive evidence that a reasonable search for employment had been made. In *Harvest Queen Mill & Elevator Company*, 90 N. L. R. B. 320, issued June 1, 1950, the Board reaffirmed the *Ohio Public Service* policy for then existing peacetime employment conditions and extended the rule as to the evidentiary effect of registration to include registration with State employment services. Since 1950, we have had opportunity to observe that doctrine's application under diverse employment conditions. In the light of this experience, we have reconsidered the *Harvest Queen* policy. As before, the burden will remain on the Employer to show that there has been a failure to make reasonable search for other employment. However, in view of the fact that government employment services are but one of several means which are normally used by unemployed persons in seeking new employment and their effectiveness in placing registrants varies widely with the type and supply of labor being sought, we shall no longer give conclusive weight to registration with such agencies in determining the issue of reasonable search, but shall treat such registration as a factor to be given greater or less weight depending upon all the circumstances in each case. In our opinion, the rule which we here adopt will implement the sound policy of minimizing the back-pay obligation without sacrifice of the remedial objective sought to be achieved through the Board's back-pay orders.

In the instant case, the facts as to the dischargees' search for new employment are briefly as follows:

Mrs. Hill and Mrs. Fugate, prior to their discharge on May 1, 1951, were employed as knitters at the Respondent's plant in Spring City, Tennessee. The Respondent's plant was the only manufacturing establishment in Spring City. Shortly after their discharge,

Mrs. Hill and Mrs. Fugate registered with the Tennessee Department of Employment Security at its Rockwood office. They maintained their registrations in active status until 60 days beyond the expiration of the 22-week period of entitlement to unemployment benefits for the year 1951.[3] They registered again at the Rockwood office during a similar benefit period in 1952. During their back-pay periods, the dischargees received no job referrals from the State employment service. Soon after their registration, Mrs. Hill and Mrs. Fugate canvassed textile employment opportunities in Rockwood and Dayton, Tennessee, cities about 16 miles north and south of Spring City, respectively. They applied, without success, at the only textile plant in Rockwood and at 3 or 4 of such plants in Dayton. Mrs. Fugate, who resided in Spring City throughout her back-pay period, re-checked these plants approximately once a month, occasionally skipping a month as to some. Mrs. Hill revisited these plants about once a month during the portions of her back-pay period when she resided in Spring City. However, for a substantial part of her back-pay period, she lived in Chattanooga, Tennessee, and Detroit, Michigan, in which cities her husband had secured employment. During the times she was in Chattanooga, she transferred her registration to the local office of the Tennessee Department of Employment Security, she applied independently, without success, at 7 plants, textile and other, and she re-checked most of these plants about once a month. In Detroit, she transferred her registration to that State's employment service and applied independently at several motor companies without success.

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[3] We take official notice of the practice of the Tennessee Department of Employment Security in maintaining registrations of employment applicants in active status for periods of at least 60 days beyond the expiration of their entitlement to unemployment compensation.

There were 2 textile plants at which the dischargees did not apply, one located about 21 miles to the east of Spring City and the other about 40 miles to the south. The dischargees made no effort to canvass lower-paying employment which may have been available to them, such as retail stores, seasonal freezing plants in Dayton, and seasonal crop-picking.

The Trial Examiner found, and we agree, that Mrs. Hill and Mrs. Fugate revisited the textile plants named by them with sufficient frequency to show due diligence in keeping their applications current at those plants, and that, under all the circumstances, including their employment registration and their independent efforts to find employment, they made reasonable efforts to secure positions substantially equivalent to those from which they were discharged. However, the Trial Examiner further found that, after a reasonable period of time had elapsed during which their efforts to obtain substantially equivalent employment were unsuccessful, the dischargees should have become aware that their efforts would continue to be futile unless they "lowered their sights" and sought also lower-paying employment within their mental and physical capacities. Applying this theory, he concluded that the dischargees should have instituted such broadened search after a period of about 8 months, and that, as no efforts were made to secure lower-paying retail employment in the cities to which they had extended their search, or seasonal employment at freezing plants in Dayton, offsets to their gross back pay were warranted based upon reasonable estimates of the loss of earnings so incurred. The General Counsel excepted to the Trial Examiner's rationale and conclusions in this respect on the ground that they imposed a new and inequitable standard by which to judge reasonable efforts to find desirable new employment. We find merit in the exception.

The Board, in ordering back pay, seeks thereby to dissipate the effects of violations of the rights guaranteed to employees under the Act. The compensation to the discriminatees is not theirs as a matter of right, but is an incidental consequence of the Board's back-pay remedy. As the rights being protected are public rights, the duty which the Board imposes on discriminatees to minimize their loss of earnings stems not so much from the equitable principle of mitigation of damages applied by the courts in private actions, as from the healthy policy of promoting production and employment. The duty to minimize loss in the Board's back-pay cases owes its genesis to the Supreme Court's decision in *Phelps Dodge*.[4] There, the Supreme Court decided, *inter alia*, that respondents should be permitted to adduce proof on the issue of willful loss of earnings as an offset to back pay. The Court, after referring to the discretion entrusted to the Board by Congress in the application of the back pay remedy, stated: "The Board will thus have it within its power to avoid delays and difficulties incident to passing on remote and speculative claims by employers, while at the same time it may give appropriate weight to a *clearly unjustifiable refusal to take desirable new employment.*"[5] [Emphasis added.] In the *Ohio Public Service* case, the Board, in the interest of promoting production and employment during the war, extended the duty to minimize loss by requiring discriminatees *to make reasonable efforts to seek* desirable new employment. As above indicated, this policy was reaffirmed in *Harvest Queen* for the peacetime conditions existing in early 1950.

To extend the duty to minimize loss still further, as recommended by the Trial Examiner, by requiring

[4] *Phelps Dodge Corp. v. N. L. R. B.*, 313 U. S. 177, 197-200.
[5] *Ibid.*, at 199-200.

discriminatees to "lower their sights" after an initial period of unsuccessful effort to find substantially equivalent employment, would, in our opinion, seriously impair the effectiveness of the back pay remedy as a means of effectuating the purposes of the Act. We do not believe that the Supreme Court's rationale in *Phelps Dodge* requires us to adopt such an extension of the duty. We conclude that in cases involving the issue of reasonable search, the obligation of a discriminatee to minimize his loss of earnings is satisfied if he makes reasonable efforts to find new employment which is substantially equivalent to the position from which he was discharged and is suitable to a person of his background and experience. The types of employment which fit this standard will depend upon the circumstances of each case. We note that this standard, which we have consistently followed since *Ohio Public Service*, has been facitly approved by the courts in the enforcement of the Board's back-pay cases.

Under all the circumstances of the instant case, we find that Mrs. Hill and Mrs. Fugate made reasonable efforts to find desirable new employment during their back-pay periods. We shall therefore order the Respondent to pay them the full amounts of back pay which it agreed they would have earned but for the discrimination practiced against them.

ORDER

Upon the basis of this Supplemental Decision and the entire record in this case, the National Labor Relations Board hereby orders that the Respondent Southern Silk Mills, Inc., Spring City, Tennessee, its officers, agents, successors and assigns, shall pay to Irene M. Hill and Effie Reed Fugate net back pay in

the amounts of $6,536.62 and $5,666.64, respectively.

Dated, Washington, D. C.

NATIONAL LABOR RELATIONS BOARD,
BOYD LEEDOM,
Chairman.
STEPHEN S. BEAN,
[SEAL] *Member.*

PHILIP RAY RODGERS, Member, concurring and dissenting:

I concur in the modification of the *Harvest-Queen* rule as set forth in the majority's opinion. I would not, however, find that Mrs. Hill and Mrs. Fugate made reasonable search for employment during the period when they were not actively registered with the Tennessee Department of Employment Security. Accordingly, I would deduct $4,335.67 from the back-pay award of Mrs. Hill and $3,385.67 from the back pay award of Mrs. Fugate.[6]

Dated, Washington, D. C.

NATIONAL LABOR RELATIONS BOARD,
PHILIP RAY RODGERS,
Member.

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[6] The amounts thus awarded would cover the earnings the dischargees would have had during the periods of their registration with the State employment agency. The length of such periods of registration is arrived at by adding, to each of the two 22-week periods of entitlement to unemployment benefits during which each registrant made regular visits to the agency's offices, the additional period of 60 days during which, under the State agency's practice, as officially noted by the Board, an applicant's registration is maintained in an active status despite the cessation of his visits to the agency's offices. The amount of earnings during such periods is based upon the average weekly earnings which it was agreed the dischargees would have made in the years covered by such periods. In the case of Mrs. Hill, her average weekly earn-

ABE MURDOCK and IVAR H. PETERSON, Members, dissenting in part:

We are in full accord with that part of our colleagues' opinion which rejects as inconsistent with the remedial purpose of the Board's back-pay orders, the Trial Examiner's "lower-the-sights" theory of a discriminatee's obligation to minimize his loss of earnings. We also concur in the majority's finding that Mrs. Hill and Mrs. Fugate, under all the circumstances, made reasonable efforts throughout their back-pay periods to obtain desirable new employment, noting, however, that under the *Harvest Queen* rule to which we would adhere, it is not necessary for them to do more than register with the proper state employment office. We cannot agree, however, with the most important part of the majority decision—the new policy adopted by the majority which in effect overrules the *Harvest Queen* case by adding to the requirements set forth therein and placing further burdens upon an employee who has been discriminatorily discharged. The new policy does not change the result which would have been reached under the *Harvest Queen* rule in this particular case. We are convinced, however, that by adopting the new general policy laid down herein the majority is abandoning a simple, justifiable, easily administered rule in favor of one which will be not only difficult to administer, but will work in many cases to the detriment of victims of unfair labor practices and to the benefit of

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ings in 1951 and 1952 were $22.15 and $49.85, respectively; in the case of Mrs. Fugate, they were $23.42 and $50.21, respectively. Each of the dischargees had a period of active registration of 30 weeks and 4 days in each of these 2 years. The awards of each dischargee are therefore reached by multiplying her average weekly earnings in each year by 30 and 4 7ths.

the parties guilty thereof and thus not effectuate the policies of the Act.

The change in policy promulgated by the majority in this case involves fundamentals, and it is thus necessary to discuss fundamentals. A discharge for union activity goes directly to the heart of the Act; it strikes more effectively than any other illegal conduct at the rights of employees "to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *." (See Section 7 of the Act.) No other action by an employer can so effectively frustrate these rights guaranteed by the National Labor Relations Act as a discharge for concerted activity.

The Board is entrusted with the duty of effectuating the policies of the Act. Board orders are remedial; they are designed to expunge the unfair labor practices and to restore the status quo. As the Supreme Court of the United States declared in the *Phelps-Dodge* case,[7] "Making workers whole for losses suffered on account of an unfair labor practice is part of the vindication of public policy which the Board enforces." By discharging employees for concerted activity the employer has demonstrated in as effective a way as possible the dangers to those who would exercise the rights which the Act is designed to protect. It is accordingly incumbent upon the Board to restore as far as possible the status quo—to attempt to remove the effects of a discriminatory discharge, not only upon the dischargee but upon other employees who have become aware that concerted activity may cost them their livelihood. Thus, beginning with the first

[7] 313 U. S. 177.

days of the Act's enforcement, the Board in discriminatory discharge cases with few limitations or exceptions, as part of its effort to restore the status quo, has ordered that discriminatorily discharged employees should be given back pay from the date of their discharge until they are reinstated in their jobs.

Of course, no back-pay order of the Board can make a discriminatorily discharged employee completely "whole." No such order can blot out the panicking realization that a family's income has stopped, or at least has been devastatingly curtailed; nothing can undo those periods of despair during which family resources, if there are any, are being depleted; no such order can restore the family home or car which may have been lost by failure to make payments on the mortgage, or insurance which has been cancelled; nothing can erase the effects of the sense of insecurity experienced by children involved in such a situation. These and many other financial and emotional losses which the Board's back-pay order does not cure, may well, and do, result from discriminatory discharges. Their existence further emphasizes that we must be particularly alert that any requirement to mitigate back pay is not turned into a weapon to penalize those who have been the victims of unlawful discharge by unjustifiably reducing the employer's back-pay obligation.

In order to get a full perspective and understanding of this problem it is desirable to consider the historical development of the Board's treatment of it. Before the *Phelps Dodge* decision of the Supreme Court in 1941 the Board computed net back pay by simply deducting *actual* net interim earnings from the gross back pay due in order that the employee would not be made more than whole. In the *Phelps Dodge* case the Court stated that "Since only actual losses should be make good, it seems fair that deductions should be

made not only for actual earnings by the worker but also for *losses* which he *wilfully incurred* * * *." [Emphasis supplied.] In referring to the Board's discretion, the Court stated that the Board had the power "* * * to avoid delays and difficulties incident to passing on remote and speculative claims by employers, while at the same time it may give appropriate weight to a *clearly unjustifiable refusal to take desirable new employment.*" [Emphasis supplied.] The Supreme Court in passing on this aspect of the *Phelps Dodge* case simply stated that the Board should give appropriate weight to a "clearly unjustifiable refusal to take desirable new employment" and that "the employer should be allowed to go to proof on this issue * * *." In *Ohio Public Service Company*, 52 N. L. R. B. 725, after pointing out that in deciding whether dischargees had wilfully incurred a loss of earnings it had been following a policy of restricting the inquiry to whether the dischargee had been guilty of "an 'unjustifiable refusal to take,' or had given up, desirable new employment," the Board decided that "in view of the exigencies of war, the current manpower shortage, and present employment opportunities," dischargees should make a reasonable effort to secure desirable new employment *to the extent of registering with the United States Employment Service.* The Board held that, if a dischargee registered with the Federal employment agency, such registration was conclusive evidence of a reasonable search for employment; and that the employer seeking to reduce the back pay due would then be restricted to evidence that the employee without good cause, "rejected an offer of, or gave up, desirable new employment." If the dischargee failed to register, however, the employer could then "proceed to prove that no other reasonable effort to secure new employment has been made." This wartime policy was reaf-

firmed for peacetime by the Board in *Harvest Queen Mill and Elevator Company*, 90 N. L. R. B. 320.

This history of the Board's back-pay policy on wilfully incurred losses thus shows that the Board has been reluctant to erect obstacles to the performance of its own obligation under the Act to "make whole" an employee who has been discriminatorily discharged, that the Supreme Court has indicated that the proper test for reducing back pay beyond actual net earnings in case of wilfully incurred losses should simply be a *clearly unjustifiable refusal* to take desirable new employment, and that under wartime emergency the Board held that dischargees should make a reasonable effort to secure new desirable employment to the extent of registering with the United States Employment Service. Although the Board in *Harvest Queen* went beyond the requirements of the Supreme Court and extended the wartime requirements of registration with the appropriate state or federal employment agency to peacetime, we believe that it was not unreasonable to do so. It requires no great effort for a dischargee to register with the appropriate state or federal employment office. In so doing he both indicates his willingness to work and effectively places himself on the labor market for referral to a substantially equivalent job. If he refuses such a job when offered, then he has wilfully incurred a loss and of course has no claim or right to be paid back pay while enjoying such wilful idleness.

The question posed by the majority's action in substituting a new policy for the *Harvest Queen* rule is, how much more should be required of a dischargee than registration with a state employment office in order to preserve his back pay. The majority say registration is not enough; that the dischargee must independently make other efforts to get employment without delineating the scope of such efforts. We

cannot agree that a policy of promoting production and employment would require dischargees to do more in placing themselves on the labor market than register with the appropriate agency. Part of the work of employees in state employment offices is to keep in continuous touch with the employment needs of employers in the area in order to be able to place registrants and fill the needs. Employers who need workers know that they can get them at the state agencies. Indeed, a study made by the Board's Industrial Analysis section disclosed that the former practice of the Tennessee employment offices here involved, of interrogating recipients of unemployment compensation benefits as to independent efforts to get jobs, had been stopped by the legislature at the instance of employers who did not want to be bothered entertaining many individual applications for work but preferred calling the state employment office when they needed workers.

Furthermore, in substituting for the easily applied *Harvest Queen* test of registration with a state employment agency as conclusive evidence of a reasonable effort to get interim employment, the new requirement that the dischargee independently do *more* to get employment, the majority is creating a new rule the precise requirements of which are not defined, which cannot be understood by dischargees, field personnel or Trial Examiners, and which will be productive of extensive litigation and uncertainty in back-pay cases. In cities like Chicago, New York, and Los Angeles, to how many establishments and over how large an area must a dischargee independently apply for work in order to be deemed to have made a reasonable search for employment? In smaller communities, how many miles distant to other towns must dischargees go in search of work? If an employer establishes that a plant in a nearby community to which the dischargee did not apply, hired 12 persons for substantially equivalent

work during the back pay period, do we presume that the dischargee would have been hired rather than someone else had he applied, and accordingly deduct the pay of such a job from the back pay due? Or, would the Board not have to consider the relative skills and employment histories of those hired as compared with the dischargee and decide whether his comparative record was such that he would or would not have been hired in competition with those actually hired had he applied, a question easily the subject of extensive litigation but not easily resolvable. Substantial records will be developed just to encompass employer evidence as to all employment opportunities alleged to exist in the area and General Counsel's evidence tracing all the independent efforts made by the dischargee to get employment. We can foresee under the new rule where the Board in some cases may be spending more time and effort in litigating the question whether the dischargee has independently done enough to minimize the employer's back pay obligation than was spent in litigating the unfair labor practice. We can see no justification for so dissipating our energies in that direction. An employer has committed an unfair labor practice when he discriminatorily discharges an employee. Our primary concern is purging that unfair labor practice —not minimizing the consequences thereof to the employer. The employer has it within his own power to stop the running of back pay at anytime by restoring the employee to his job or by seeing that the employee is offered a substantially equivalent job by someone else. We can find no sound reason for imposing new requirements on dischargees designed to further minimize back pay obligations and tending to complicate ascertainment of the amount of back pay due under our orders.

Accordingly, we strongly disagree with the ruling of the majority overturning the *Harvest Queen* rule which makes registration with the appropriate employment agency conclusive evidence of a reasonable search for employment and substituting this new policy.

Dated, Washington, D. C.

NATIONAL LABOR RELATIONS BOARD,
ABE MURDOCK,
Member.
IVAR H. PETERSON,
Member.

DAYTON, TENN.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

DIVISION OF TRIAL EXAMINERS

Washington, D. C.

Case No. 10-CA-1293

SOUTHERN SILK MILLS, INC., AND UNITED TEXTILE WORKERS OF AMERICA, AFL

John C. Carey, Esq., for the General Counsel.
Mr. Calvin R. Ray, Lenoir City, Tenn., for the Union.
H. M. Humphreys, Esq., Chattanooga, Tenn., *C. P. Swafford, Esq.*, Dayton, Tenn., and *R. W. Kemmer, Esq.*, Spring City, Tenn., for the Company.

SUPPLEMENTAL INTERMEDIATE REPORT

STATEMENT OF THE CASE

On October 21, 1952, the National Labor Relations Board issued a Decision and Order in the above-en-

titled case, 101 N. L. R. B. 1, finding *inter alia*, that the Company had violated Section 8 (a) (1) and (3) of the National Labor Relations Act, as amended, by discharging 40 employees. The Board, as part of the relief ordered, directed the Company to make these employees whole for any loss of pay which they might have suffered as a result of the discrimination against them.

In due course, the Board petitioned the United States Court of Appeals for the Sixth Circuit for enforcement of its Order. On December 21, 1953, the Court granted enforcement of the Board's Order. Thereafter, on June 29, 1955, the Regional Director for the Tenth Region issued a Notice of Hearing for the purpose of receiving evidence material to a determination of the amount of back pay due the discriminatees. Informal negotiations between the General Counsel and counsel for the company, both before and after the issuance of this Notice, resulted in agreement in 38 of the 40 individual cases. The 2 remaining cases on which evidence was presented at the hearing are those concerning Ireine M. Hill and Effie Reed Fugate.

There was agreement as to the gross earnings of these two dischargees. In the case of Mrs. Hill it was stipulated that in the period May 1, 1951, to June 7, 1954, the date when she was reemployed by the Company she would have earned $6,536.62, absent the discrimination against her. In the case of Mrs. Fugate it was stipulated that in the period May 1, 1951, to November 27, 1953 (the agreed cutoff date when she discontinued efforts to obtain work), she would have earned $5,666.64, absent the discrimination against her. Figures submitted as part of the written stipulations as to each of these individuals show that their average weekly earnings in the years involved would have been as follows:

	1951 (35 weeks)	1952	1953	1954 (23 weeks)
Mrs. Hill	$22.15	$49.85	$45.97	$33.83
Mrs. Fugate	23.42	50.21	[1] 46.57	.....

[1] 48 weeks.

The Board, in its Decision and Order in this case made its customary direction that the Company make the dischargees whole for any loss of pay they might have suffered by payment to them of a sum of money which they would have normally earned, absent the discrimination against them, less their net earnings during the period involved. Neither Mrs. Hill nor Mrs. Fugate had any offsetting earnings. Therefore, they are entitled to the full amount of the gross pay without any deduction unless their failure to secure other employment was willful[1] or due to their unavailability for work. That is the issue which was litigated at the hearing.

A. *Employment opportunities and efforts to secure employment in Spring City*

The plant at which the discharges took place is located in Spring City, Tennessee, a town of about 1,600. Both dischargees lived in Spring City at the time of their discharge. Mrs. Fugate continued to reside there at all times material while Mrs. Hill lived in Spring City, Chattanooga, Tennessee, and Detroit, Michigan, during the period. The Company was and is engaged in the manufacture of women's apparel. Both the dischargees were employed as knitters at the time of their discharge.

The Company's plant and the Rhea County Lumber Company are the sole industrial establishments in the town. There was no factory employment available for women in Spring City except at the Company's plant.

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[1] *Phelps Dodge Corporation* v. *N. L. R. B.*, 313 U.S. 177, 197-200.

However, evidence was introduced as to other possible employment opportunities there.

According to V. S. Cline and J. B. Torbett, witnesses produced by the Company, there are five eating places in Spring City. Three are restaurants and might employ female help. There also are some retail stores which use female help, especially two dry goods stores. Cline, himself, is city manager and operates a drugstore and luncheonette. He employs 7 women, 2 as cooks, and the rest as soda fountain attendants and clerks. Two of these employees are part-time employees. The salary range is $23 to $30 per week. Cline testified there had been four replacements in his staff from May 1951 to June 1954.

Torbett operates a variety store and employs two full-time women clerks and extra help as needed. He has had one full-time vacancy in the period material herein. There also is another drugstore and luncheonette in town employing 2 or 4 women.

Approximately 10 miles from Spring City there is a resort known as Watts Bar Village. Spring City is its home base. According to Don E. Smith, its owner, from 1951 to 1954 total staff increased from 25 to 35. There are now 30 women employees, 22 of whom are white. The women employees are used as kitchen help, waitresses, and maids. Smith estimated that the average salary of these employees would be $20 to $22 a week plus tips for the 7 months the resort is operated. Most of the staff vacancies arise in the waitress group. Smith testified it is difficult to keep those jobs filled. He makes inquiries in Spring City to try to find help. The waitresses work staggered shifts and have to form car pools to get to Watts Bar.

Mrs. Hill and Mrs. Fugate did not attempt to secure employment in the local businesses described above. Mrs. Hill testified that she did not apply because she

had no experience in restaurants or drugstores, and understood the local rate was about $12 or $15 a week, against which she would have to offset some money for the care of her child. She had been earning 80 cents an hour at the time of her discharge.

Mrs. Fugate testified that she did not attempt to seek employment in the retail stores in Spring City, that the pay was $12 or $14 a week, and that she had had no restaurant experience.

B. *Efforts to secure employment outside of Spring City*

Both Mrs. Hill and Mrs. Fugate testified that they attempted without success to secure employment in neighboring cities. They mentioned Rockwood, Tennessee, a city 17 miles north of Spring City, and Dayton, Tennessee, 16 miles south. Both are cities of approximately 5,000 in population. They also testified to some efforts in Chattanooga, 53 miles south.

1. Efforts of Mrs. Hill to Secure Employment

Mrs. Hill was discharged by the Company on May 1, 1951. On May 11 she registered with the Rockwood office of the Tennessee Department of Employment Security. She continued to report to this office biweekly until she moved to Chattanooga in October 1951. She was not referred to any positions by that office.

Mrs. Hill also made individual efforts to secure employment. She stated that she, Mrs. Fugate, and Mrs. Nettie Romines, another dischargee, filed written applications at the Rockwood Hosiery Mills in May 1951. She was told there was no work available. She continued to check at that plant approximately once a month until she moved from the area in October. She was told on each occasion that no work was available.

Mrs. Hill also attempted to secure employment in

Dayton. According to her testimony, she filed written applications in June with the Robinson Manufacturing Company, a garment plant, Dayton Hosiery Mill, and Graysville Hosiery Mill. She revisited these plants with Mrs. Fugate and Mrs. Romines approximately once a month until October 1951 when she moved to Chattanooga.

When Mrs. Hill moved to Chattanooga she registered twice with the local office of the Tennessee Department of Employment Security. She resided in Chattanooga until March 1952. In November she applied at the Dupont Company and the Chattanooga Glass Company. She checked with these firms about once a month thereafter. She also filed applications with the Dixie Mercerizing Company, American Lava Company, Davenport Hosiery Mill, the Quaker Oats Company, and D. M. Steward Company. She also applied at a private employment agency, but found they needed secretarial and office help, positions for which she was not qualified. She checked back at the plants once a month, according to her testimony, but without any success.

Mrs. Hill moved back to Spring City in March 1952 and remained there until the latter part of May. She reregistered in May with the Rockwood office of the Division of Employment Security and, in company with Mrs. Fugate and Mrs. Romines, checked with the companies where she had previously filed applications.

Mrs. Hill lived in Detroit from May to September 1952. She registered with the State Employment Service and reported there every week, according to her testimony. She also applied at several motor companies.

Mrs. Hill moved from Detroit to Spring City in September 1952, but remained there only until mid-October when she went to Chattanooga. While in Spring City

she registered with the State Employment Office in Rockwood and checked the firms where she had previously filed applications. When she moved to Chattanooga, she followed the same procedure of registering with the local State Employment Office and checking at places where she had previously filed applications. She resided in that city until November 1953 when she returned to Spring City and went to live on a farm she and her husband purchased the next month. After November 1953, she testified, she registered at Rockwood and once a month checked at the plants where she had previously filed applications, both locally and in Chattanooga. All her efforts were unsuccessful. She was offered reinstatement in June 1954 and returned to the Company on June 7, 1954. Her back-pay claim has its terminal date as of the date of her reinstatement.

On cross-examination Mrs. Hill testified that she was 28 years old and that she had lived on a farm near Spring City all her life until she was married in 1948. She helped with some farm chores while at the farm. Her first and only job was with the Company herein where she worked in the garment department and knitting room.

As to her efforts to secure employment, she testified that she knew there was a factory near Crossville, Tennessee, approximately 26 miles northwest of Spring City, but did not know what was manufactured there, the type of help needed, and had never applied there. She testified that she knew that some of the eight women discriminatees obtained some employment, including one who went to work for the Southern Freezing Company in Dayton. Mrs. Hill stated she did not apply there because she felt it would not do her any good because she understood there was some ownership connection between it and the Company herein. Nor did she register at the Dayton office of the Tennessee

Division of Employment Security. She did receive unemployment compensation payments in 1951 and 1952 covering 22 weeks in each year.

Henry Hill, Mrs. Hill's husband, corroborated her testimony. Hill, who was discharged by the Company at the same time as Mrs. Hill, testified that he drove her, Mrs. Fugate, and Mrs. Romines to plants where they applied for work. He mentioned Rockwood Hosiery Mill at Rockwood, and Robinson Manufacturing Company, Graysville Hosiery Mill and Dayton Hosiery Mill in Dayton. He testified that he drove them to these plants several times beginning shortly after their discharge. He further testified that he took Mrs. Hill to several plants in Chattanooga when they resided there in 1951 and 1952. He mentioned the Dupont Company, Quaker Oats Company, Dixie Mercerizing Company, Davenport Hosiery Mill and Chattanooga Glass Company.

When the Hills returned to Spring City in 1952, Hill, according to his testimony, drove his wife to the plants she had previously visited.

It was stipulated that for the period May 1, 1951, through the first quarter of 1954, Hill's actual earnings in each calendar year were as follows:

1951 (May 1-December 31)	$1,367.17
1952	3,548.84
1953	4,800.00
1954 (1st quarter)	1,200.00
	$10,916.01

Counsel for the Company contended in argument that these figures show that Hill had sufficient income and that there was no inducement or reason for Mrs. Hill to be seeking employment.

Hill also admitted in cross-examination that he knew there were other plants in Dayton, but that he understood that they were not doing any hiring.

Nettie Romines testified that she accompanied Mrs. Hill and Mrs. Fugate on their trips in search of work. She corroborated previous testimony that they had applied at the Rockwood Hosiery Mill in Rockwood and the Dayton Hosiery Mill, also known as the Standard Hosiery Mill, Graysville Hosiery Mill, and Robinson Manufacturing Company in Dayton. She testified that on some of her trips to recheck for work she would be accompanied by either Mrs. Hill or Mrs. Fugate or would be alone. She estimated that she went several times with each of them to the Rockwood Mill in 1951. They did similar checking in Dayton and continued checking with the same plants in 1952. She and Mrs. Fugate went to the same plants in 1953.

Mrs. Romines testified that she secured about 2 weeks' work at the Graysville Hosiery Mill in the latter part of 1952. In August 1953 she obtained work at the Homer Holloway Grocery in Spring City at a salary of $15 a week, but continued looking for other work. She obtained work at another Spring City grocery store in 1954, but left it when she was offered reinstatement by the Company. She also testified that she knew of the existence of a freezing plant in Dayton at which one of the dischargees had obtained work, but she stated that other dischargees told her the management was not hiring anyone who had been discharged by the Company—that the freezing plant was owned or controlled by those who owned Southern Silk.

2. Efforts of Mrs. Fugate to Secure Work

Mrs. Effie Fugate, the second discriminatee whose back pay is in issue here, unlike Mrs. Hill, resided in Spring City all during the period covered by her back-pay claim. Since, according to her testimony, she applied for work with Mrs. Hill and Mrs. Romines, her testimony paralleled theirs. She was not able to

obtain work from the date of her discharge May 1, 1951, until November 27, 1953, when, she testified, she quit looking for work because she had been told at places she applied that she was too old.

Mrs. Fugate registered with the Tennessee Division of Employment Security at Rockwood on May 11, 1951, and reported there every 2 weeks in 1951 until November 14. She was not referred to any work opportunities by this agency. She applied to the Rockwood Hosiery Mill with Mrs. Hill and Mrs. Romines in May and checked back about 6 or 8 times in 1951 with these ladies, according to her testimony. She applied to the Dupont Company in Chattanooga with Mrs. Romines, but was rejected on account of her age. In May, after applying to the Rockwood Mill she went to Dayton and applied at the Dayton Hosiery Mill, also known as the Standard Hosiery Mill, Robinson Manufacturing Company, and Graysville Hosiery Company. She later applied to the S and F Company. Mrs. Fugate testified that she rechecked those places 6 or 8 times in 1952 as well as registering with the State Employment Office in Rockwood. She further testified that she checked the above plants in 1953 until she gave up looking for work in November. She was reinstated at the Company in June 1954 and worked there for approximately 1 year when she voluntarily quit. She has not sought work since.

On cross-examination, she testified that her mother, who was bedridden and needed care, lived with her from the latter part of 1952 until she died on August 3, 1953. However, Mrs. Fugate maintained that she continued to look for work during this period and could have worked and made provision for the care of her mother. Other points brought out in her testimony were that her husband is working and that her work experience includes 2 or 3 weeks' work with automatic

electric machines in a restaurant 10 or 12 years ago and that she lived on a farm and did farm chores prior to her marriage. At the time she was discharged she was a knitter earning 95 cents an hour.

In 1952 a hearing was held by State authorities to determine Mrs. Fugate's eligibility to receive unemployment compensation payments. She was held entitled to receive them.

C. *Company evidence on employment opportunities*

In addition to evidence presented on employment opportunities in Spring City, the Company introduced evidence on employment opportunities in adjoining cities which either were not canvassed by the dischargees or which were canvassed by them but, according to the Respondent, not to the extent claimed.

On the question of employment opportunities not canvassed, T. Frank Mosher, personnel manager of Mosher Laces, Inc., a plant approximately 21 miles from Spring City in the direction of Crossville, Tennessee, testified that his company began operations in July 1952. Its operations are similar to those performed at the Southern Silk—a tricot knitting operation. Its work force averages about 40, of whom approximately 50 percent are women. Some of its employees, according to Mosher, live in Spring City. Mosher also estimated that his company has employed about 100 females since its opening and that he has interviewed three to four hundred applicants. Mosher placed help-wanted advertisements in the local Crossville paper when operations began. He also has used the local employment service office as a source of supply.

W. Gregory Tuck, vice president of Kingsboro Mills, Daisy, Tennessee, testified that his plant, 40 miles from Spring City, is used to manufacture the same products

as Southern Silk. Equipment and type of help used is identical. Total employment is approximately 200, of whom about 160 are female. Women do sewing and cutting; men, knitting and maintenance work.

David C. Kirkham, farm placement interviewer for the Tennessee Department of Employment Security with headquarters in Rockwood, gave testimony on opportunities for farm employment in the area. He testified that there is seasonal need for crop harvesters and that wide publicity is given to the recruiting drive he manages. The picking season is generally from mid-April to mid-October. The chief crops involved are strawberries and beans. There is some demand in connection with other crops in the intervening months. Kirkham estimated that about 80 percent of the workers are women and girls. He estimated that they average $4 to $6 a day on a piece-work basis. Work crews operated from Spring City and other communities. The practice throughout the area is that pickers will meet trucks in a community and be driven out to farms where they are needed. He also testified that in an average year there is a total of 50 to 70,000 days of work in crop harvesting in the 6-county area he services, with maximum employment between April and July. When schools are not in session, about 50 percent of the pickers are school children. Kirkham also stated that there is a canning plant in Crossville which is operated 2 to 2½ months a year.

William Jaco, industrial relations representative, Department of Employment Security, gave details on the general procedures of his department and conditions at his post of duty, Dayton, Tennessee. The Tennessee Department of Employment Security is affiliated with the U. S. Employment Service. There are local offices at Dayton, Rockwood, and Crossville. The dischargees admittedly did not register at the Dayton

and Crossville offices. The duties of the local offices include the payment of unemployment compensation and the servicing of local industries. The Dayton office tries to fill employment opportunities at local plants such as Iceland Gardens and Southern Freezing and Preserving Company, both frozen food plants, and hosiery mills such as Graysville Hosiery Mill, and Robinson Manufacturing Company.

The Dayton employment office gives aptitude tests for the freezing plants and supplies about 98 percent of their labor, according to Jaco. The peak demand for labor at these plants is from the last few days of April until the middle of June. Approximately 75 percent of the workers are females and their starting salary is 75 cents an hour.

Jaco also testified that his office made approximately 2,500 female placements from May 1951 to May 1954. This computation included all placements regardless of the duration of the jobs. There were about 11,000 agricultural placements during that period. Of the 2,500 nonagricultural placements, Jaco testified, most were in the unskilled category, about 225 would be service and clerical, and about 135 were semiskilled, such as hosiery knitters. Three-fourths of the semiskilled category of about 135 included workers are sent to hosiery mills. The rest are sent to a local basket manufacturing company which employs up to 40 or 50, most of whom are on a piece-rate basis.

As to the organization of the Tennessee Division of Employment Security, Jaco testified that there are 60 or 70 local offices. There is none in Spring City. There are offices in Dayton and Rockwood. Both cities are 16 or 17 miles from Spring City. According to Jaco, there is no territorial division among the local offices. Residents of Spring City might and do use either office. There also is a local office in Crossville. There is gen-

erally no interchange of information on job openings among the local offices except on jobs difficult to fill. The agricultural placement program for the area is directed from the Rockwood office.

Evidence was also presented by the Company on the issue of whether the dischargees actually applied to companies they maintained they visited. Harold M. Humphreys, of counsel to the Company, testified that he also represents Rockwood Mills, a company with whom the dischargees testified they filed applications in May 1951. He testified he personally checked the files of that company and found an application filed by Mrs. Fugate on June 29, 1952, but none in the name of Mrs. Hill.

Mrs. Katie Denton, forelady at Robinson Manufacturing Company, Dayton, testified that her duties include the hiring of personnel for her concern and for Rhea Mills, an associated concern in the same building. She keeps a file of her applications. The records show, she testified, that Mrs. Fugate applied for work in June 1952. There was no application on file from Mrs. Hill.

Mrs. Denton further testified that all applications were kept for a period of years and she would have an earlier application from Mrs. Fugate if one had been filed. She did not recall Mrs. Fugate checking back for work regularly after the application was filed, nor did she recall ever having seen Mrs. Hill.

During the period from May 1951 to June 1954, approximately 65 new inexperienced employees were hired. Only 1 written application is taken from an applicant, although sometimes a note is put on her application when she checks back.

During the hearing, Mrs. Denton produced the employment applications on file with her company. These, she testified, were complete except for those applica-

tions which were removed because the applicants received employment from the Company or received work elsewhere. The records show 61 were filed in the last 6 months of 1951, 8 in January 1951, 1 in March, and 8 in June. Mrs. Denton could not think of any reason why there should be a gap in applications from January to June 1951. She recalled seeing Mrs. Fugate when the latter filed her application, but not since. Some applicants however check with William Robinson of Rhea Mills.

Robinson, a brother of Mrs. Denton, and superintendent of Rhea Mills, testified that he recalled seeing Mrs. Fugate at the office, but could not recall how often. Rhea Mills normally employs 52, all of whom are female except 1. During the period from May 1952 to the date of the hearing 25 new employees were hired and 14 experienced employees returned to work, according to Robinson. Robinson Manufacturing Company, Robinson testified, now employs between 210 and 235. Its staff was 25 or 30 less in 1951 and 1952.

Robinson recalled speaking with Henry Hill but could not recall when he spoke with him or the subject of the conversation. Henry Hill testified that within a few weeks of his discharge on May 1, 1951, he drove Mrs. Hill, Mrs. Fugate and Mrs. Romines to the employment office of Robinson Manufacturing Company, that he went into the mill with them, and spoke with Robinson about employment opportunities at the plant while the three ladies were filling out application cards. The application files of the Robinson Company for the period when the discriminatees said they applied to that Company were apparently incomplete. Mrs. Denton could not account for the almost total lack of applications for that period. Although Mrs. Denton testified that there was no application on file for Mrs. Hill and that she did not recall seeing her, Robinson did re-

call speaking with Henry Hill. Although Robinson could not recall the subject of the conversation, it does not appear from the record that Robinson and Hill would have had any occasion to speak to each other except at the plant. This factor tends to corroborate Hill's testimony that he drove Mrs. Hill and Mrs. Fugate to the plant in May 1951 and spoke to Robinson about employment opportunities there.

Harold Humphreys testified that he personally examined the file of applications at Rockwood Mills and found a 1952 application for Mrs. Fugate, and no other. However, no witness in charge of those files was produced and thus there is no evidence in the record as to the condition of those files and company procedure with regard to them.

Mrs. Hill and Mrs. Fugate impressed the undersigned as witnesses who were trying to and were giving an honest account of their efforts to seek work. Their testimony was supported by that of Mrs. Romines and Henry Hill, witnesses whose testimony the undersigned found worthy of belief. Accordingly, the testimony of Mrs. Hill and Mrs. Fugate that they applied to the companies they named in their testimony is credited. They did not keep any written records of the number of times they revisited these plants so that their testimony on this point is necessarily an approximation. Nevertheless, the undersigned finds from their testimony that these visits occurred with sufficient frequency to show that they exercised due diligence in keeping their applications current at those plants.

Conclusions

The chief issue in this case is whether as a matter of law Mrs. Hill and Mrs. Fugate made a reasonable search for work or whether their loss was wilfully incurred and they should not receive compensation for it.

In *Phelps Dodge Corp.* v. *N. L. R. B.*, 313 U. S. 177, the court declared:

> Making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces. Since only actual losses should be made good, it seems fair that deductions should be made not only for actual earnings by the worker but also for losses which he willfully incurred (p. 198-199) * * * The remedy of back pay, it must be remembered, is entrusted to the Board's discretion; it is not mechanically compelled by the Act. And in applying its authority over back-pay orders, the Board has not used stereotyped formulas but has availed itself of the freedom given it by Congress to attain just results in diverse, complicated situations. See (1939) 48 Yale L. J. 1265. The Board has a wide discretion to keep the present matter within reasonable bounds through flexible procedural devices. The Board will thus have it within its power to avoid delays and difficulties incident to passing on remote and speculative claims by employers, while at the same time it may give appropriate weight to a clearly *unjustifiable refusal to take desirable new employment*. By leaving such an adjustment to the administrative process we have in mind not so much the minimization of damages as the healthy policy of promoting production and employment (p. 199-200). [Emphasis supplied.]

The court, therefore, stressed "unjustifiable refusal to take desirable new employment." During World War II, the Board pursuant to its decision in the *Ohio Public Service Company* case (52 N. L. R. B. 725, 729, enforced 144 F. 2d 252 (C. A. 6), cert. den., 324 U. S.

857), received evidence to determine whether a discriminatee made reasonable efforts to secure desirable new employment. After the war years it extended this rule to peacetime conditions. In *Harvest Queen Mill & Elevator Company*, 90 N. L. R. B. 320, it declared:

> We are of the opinion that the requirement set forth in the *Ohio Public Service* case, that claimants make reasonable efforts to secure desirable new employment is a sound rule, without regard to the special wartime conditions of September 1943, which were adverted to in the quoted portion of the decision. So that an employer's back-pay obligation may be mitigated as much as possible, the requirement should be met by claimants under today's conditions as well.
>
> As facilities equivalent to the United States Employment Service are maintained by the various States as a medium for seeking employment, we shall regard registration with such State offices or with the United States Employment Service as conclusive evidence that a reasonable search for employment has been made. As we held in the *Ohio Public Service* case, where such registration has been established any party urging a diminution of a back-pay award will be restricted to the introduction of evidence showing that the claimant, without good cause, rejected an offer of, or gave up, desirable new employment. If evidence showing a failure of registration is adduced, additional evidence may then be presented to prove that no other reasonable effort to obtain desirable new employment has been made. In determining whether there has been such reasonable effort, we shall consider all the evidence, including circumstances which explain the failure to have done so.

There has been application in a number of cases of the requirement of a reasonable search for work. In *Sterling Furniture Company*, 90 N. L. R. B. 602, 607, it was held that registration with a State employment agency plus independent efforts to secure employment in at least 6 firms constituted reasonable efforts to secure desirable new employment. In *Seamprufe, Incorporated*, 106 N. L. R. B. 1142, the Board decided that a discriminatee failed to make reasonable efforts to secure new employment when she failed to register with the U. S. Employment Service and made only 6 applications for work at various establishments during a period of 46 months. The Board took into consideration the fact that prior to her discriminatory discharge she had been employed as a machine operator and inspector in a garment factory, a job not requiring a high degree of skill. Her wage was 55 cents an hour. This, it was held, did not justify her in limiting her search to work involving the use of any special skill.

Employment efforts need not be crowned with success in order to be found reasonable (*N. L. R. B.* v. *Cashman Auto Company*, 221 F. 2d 864 (C. A. 1)), nor is a dischargee held to a standard higher than that of reasonable care. In *Efco Manufacturing, Inc.*, 111 N. L. R. B. 1032, the Board upheld a rejection by a trial examiner of a contention that a dischargee failed to use due diligence to secure appropriate employment when he obtained a job paying 90 cents an hour when he previously had received $1.05 an hour. The trial examiner held that the dischargee was not under an obligation to exert extreme care to save the respondent money, but had to use reasonable diligence in seeking appropriate employment and that this requirement had been satisfied (John J. Clancy, p. 1035).

The Board also upheld a rejection of a contention that a failure to search for employment in a more fertile territory or to check certain newspapers amounted to a lack of diligence. While a more prudent person might have done these things, other efforts to secure employment were held to satisfy the requirement of making reasonable effort (James Cummisky, p. 1036).

A discriminatee is not obliged to seek work long distances from home and to disrupt home life. In *Amb-A-Tip Cigar Company*, 64 N. L. R. B. 1009, 1020, the Board held that a refusal by a discriminatee of a position was not willful in view of the fact that the position was 28 miles from her home and was on a rotating shift. The acceptance of this position would render difficult or impossible her giving proper attention to the welfare of her husband and 14-year-old daughter.

Where there has been a prolonged period of unemployment with little or no offset earnings, the record is scrutinized very carefully to make sure due diligence has been used (*N. L. R. B.* v. *Pugh & Barr, Inc.*, 207 F. 2d 409, on remand, 111 N. L. R. B. 1353).

Turning now to the second part of the standard set out in the *Phelps Dodge* case, "desirable new employment," there have been decisions shedding light on what position a discriminatee should apply for and accept. A discriminatee cannot insist on waiting for a position in the same company (*N. L. R. B.* v. *Alaska Steamship Company*, 211 F. 2d 357, 360 (C. A. 9)). On the other hand, there are limits to the type and kind of position he must accept. A discriminatee was held justified in turning down low-paying jobs when the salary was a fraction of what he had been receiving and on which he would not have been able to support his family (*Columbia Pictures Corporation*, 82 N. L. R. B. 568, 580).

In *N. L. R. B.* v. *Moss Planing Mill Co.*, 224 F. 2d 702 (C. A. 4), a case relied on by the Company herein, the court considered the cases of two men who had had little earnings over a long period. One of them, who had general labor experience, earned $400 in a 2½-year period. The court disagreed with a holding of the trial examiner in the case that the dischargee did not have to accept agricultural jobs because they were not equivalent to the position he held at the time of his discharge and because they could not be considered desirable new employment. The court also disagreed with a holding below that a second discriminatee was not obligated to seek agricultural employment when he was semiskilled, with a knowledge of farm work and the economy of the entire area was built around the cultivation and sale of tobacco. The court remanded the case to make deductions of sums which could have been earned elsewhere had due diligence to secure other suitable employment been used.

In the instant case, the appraisal of the efforts of Mrs. Hill and Mrs. Fugate to obtain work must be considered in the light of all the circumstances. At the time of their discharge they lived in a small city where there was no other factory employment available. They did not throw up their hands, but applied for positions in the neighboring cities of Dayton and Rockwood. They also registered with the State Employment Service Office at Rockwood. They did not register with the employment office at Dayton, but there is no evidence that it was customary for applicants to register at more than one office. They canvassed almost all the important plants of Dayton in their search. When she moved from the area, Mrs. Hill made efforts to secure factory employment at Chattanooga and Detroit. The undersigned concludes from all the evidence that Mrs. Hill and Mrs. Fugate

made reasonable efforts to secure substantially equivalent positions, both as to type and salary, to those from which they were discharged.

The Company contends, however, that they should have looked for and taken other types of positions. It points to opportunities in the area for temporary employment in the harvesting of crops. Both dischargees had lived on farms and helped with chores, but there is no record of their ever having worked as field hands on a piecework basis. The duty to mitigate damages cannot be turned into a weapon to penalize those who have been discriminated against through no fault of their own. The discriminatees involved in the *Moss Planing Mill* case were men who had a background of general labor experience, including farm labor. The two women here had no such work experience. Although it was testified that women did a lot of the crop picking in the area the undersigned concludes that the circumstances herein warrant the finding that the discriminatees were not under an obligation to seek and obtain farm labor work.

The job opportunities at Watts Bar Dam and at Spring City as waitresses also were positions for which the dischargees had no training or experience. There is no evidence that they were ~~ted~~ for this work. This is true also of the chamberma~~ork~~ at Watts Bar.

There are two fields of work, however, which were not canvassed by the discriminatees which require careful consideration here. The first was work at the Southern Freezing and Preserving Company in Dayton. Both Mrs. Hill and Mrs. Fugate knew of the existence of this plant and that one of their fellow dischargees had obtained work there. They did not apply, they testified, because they had been informed that there was common ownership of that plant and Southern Silk. William Jaco of the Department of Employment Se-

curity testified that there was a peak season of about 2 months, from April to June, at the freezing plant when it was difficult to meet labor requirements. If the discriminatees had been able to obtain work only during that peak season each year they would have earned about $240 each. In 1952 Mrs. Hill would have earned less since she was not at Spring City during part of the peak freezing season.

Both dischargees made no effort to secure employment in the retail trades. It does not appear that they had any special training and experience in this field. Yet there are positions in ordinary merchandising establishments which do not require prior training. Working conditions in general are equal to factory employment. What evidence there is in the record indicates that in the Spring City area retail wages are substantially less than the wages the dischargees were earning at the Southern Silk plant. Does this factor remove these positions from the category of "desirable new employment" within the meaning of the *Phelps Dodge* decision, *supra*, or "suitable" employment as used in other decisions? The court in the *Phelps Dodge* case stressed that it had in mind " * * * not so much the minimization of damages as the healthy policy of promoting production and employment" (313 U.S. 177, 200). It is to be expected that a dischargee should continue for a certain period to seek positions at least equal to his prior position, both as to salary and other working conditions. If he were to immediately accept a position at a substantially lower salary he might face a defense that he did not exercise proper care and diligence by doing so. Yet there comes a time after opportunities for comparable jobs have been canvassed without success when the job applicant must lower his sights or face a prolonged period of idleness. Something of that situation existed in this case. The dis-

chargees canvassed factory employment unsuccessfully for 2½ years, as in the case of Mrs. Fugate, and 3 years, in the case of Mrs. Hill. Somewhere in that period it should have been obvious that their chances of obtaining such employment were small and that they should also seek lower paying positions if they wanted to work. They might not have obtained any such employment, but it would have increased their chances of success. Such positions would not have been "desirable" from the salary standpoint, but if these dischargees had the mental and physical ability to perform the work and working conditions were such that, with due regard to their training, experience, and background, the dischargees could reasonably be expected to consider them satisfactory, then the undersigned concludes they should under the policy in the *Phelps Dodge* case, be expected to apply for positions paying less than they had been receiving.[2] This would be especially so, in the opinion of the undersigned, where, as here, the dischargees had no professional or highly technical training.

Bottom limits must be recognized. The undersigned would not require these discriminatees to apply for $15 a week positions, as Mrs. Romines did. Nor should discriminatees be held strictly to canvass a market where very few job possibilities exist. If only the limited retail job possibilities in Spring City were involved, it might be questionable to direct any offset

[2] There is an apparent division in the State courts on this point in breach of contract cases. These cases are summarized in 28 A. L. R. 736, 744, 141 A. L. R. 662, 668. See also *Harris* v. *National Union of Marine Cooks & Stewards*, 254 P. 2d 673, 5 Williston on Contracts (Rev. Ed.) Sec. 1359. In the summaries of the rule contained in the Restatement on Agency, Section 455, comment d and in the Restatement on Contracts, Section 336, comment d, emphasis is placed on the necessity to take reasonable action under all the circumstances.

deductions for failure to canvass that market. However, the dischargees voluntarily had extended their search to the neighboring cities of Rockwood and Dayton, both substantially larger than Spring City. The record shows that it was customary for residents of Spring City to look for jobs in those towns. Mrs. Hill, for one-half the period involved lived in Chattanooga and Detroit and had more possibilities for retail employment. Both Mrs. Hill and Mrs. Fugate might not have been able to secure any retail employment, but the undersigned concludes that their failure to seek such employment warrants a deduction from their gross back pay for the period involved.

The date for commencement of this deduction and the amount remain to be fixed. These necessarily must be approximations, but the inability to make an exact computation is chargeable, primarily, to the Respondent Company, which made the discriminatory discharges, and, secondly, to the discriminatees, who should not profit by their failure to exert proper efforts to secure reemployment. The offset deduction should be calculated from a date when the discriminatees should have begun to check the retail market. They were discharged May 1, 1951. They spent the next 7 months in a fruitless search for comparable factory employment. It seems to the undersigned that at that point they should have widened their efforts and it will be recommended that the offset deductions be calculated from January 1, 1952.

As to the amount of the deduction, the undersigned is of the opinion that it should be fixed at a low weekly rate in view of the lack of experience on the part of the discriminatees and the possibility that they might normally encounter some period of unemployment. Off-setting this is the distinct possibility that they might have obtained 2 months of temporary work each

year at the freezing plant of Dayton. Evidence of retail earnings in the Spring City area ranged from $15 a week, earned by Mrs. Romines, to $30 paid at a local drugstore. The undersigned believes that the use of a base of $20 a week will achieve substantial justice here and effectuate the purposes and policies of the Act. To raise it higher or to deny any back pay at all during the period would not give due weight to the fact that the discriminatees could not obtain positions paying them what they had been earning at Southern Silk, even though they made reasonable efforts to secure such employment. Lowering the figure, would not reduce the gross back-pay figure to an extent commensurate with the failure of the dischargees to explore job possibilities in a substantial field of employment.

Accordingly it will be recommended that the gross back pay of Irene M. Hill of $6,536.62 be reduced by $2,540 (52 weeks in 1952, in 1953, and 23 weeks in 1954 to the cutoff date of June 7, multiplied at the rate of $20 per week). The adjusted figure is $3,996.62.

It will also be recommended that the gross back pay of Effie Reed Fugate of $5,666.64 be reduced by $1,980 (52 weeks in 1952 and 47 weeks in 1953 to the cutoff date of November 27, multiplied at the rate of $20 per week). The adjusted figure is $3,686.64.

Recommendation

Upon the basis of the foregoing findings of fact and upon the entire record in the case, the undersigned recommends that the Respondent, Southern Silk Mills, Inc., Spring City, Tennessee, its officers, agents, successors, and assigns pay to Irene M. Hill the sum of $3,996.62 and to Effie Reed Fugate the sum of $3,686.64, in satisfaction of the order directing the Respondent to make whole these claimants

It is further recommended that unless within twenty (20) days from the receipt of this Supplemental Intermediate report, the Respondent complies with the foregoing recommendations, the Board issue an order requiring the Respondent to take the aforesaid action.

Dated at Washington, D. C., this 17th day of November 1955.

SIDNEY L. FEILER,
Trial Examiner.

4. Statute

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), are as follows:

DEFINITIONS

SEC. 2. When used in this Act

* * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * * *

UNFAIR LABOR PRACTICES

SEC. 8.(a) It shall be an unfair labor practice for an employer—

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10 * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *.

* * * * *

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